92-595

Supreme Court, U.S.
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Case No.

IN THE

Supreme Court Of The United States

_____ Term, ____

JOE W. REID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Federal criminal jurisdiction pursuant to Title 18, United States Code, Section 666 extends to local "organizations," such as the municipal water works board of the City of Birmingham, Alabama, where the only federal monies received by said board were reimbursements for labor and material associated with the relocation of water facilities due to certain road building projects, rather than "benefits" as the term is generally understood.

2. Whether, in a criminal tax case, the burden of persuasion regarding the defendant's state of mind is shifted to the defendant, in violation of Due Process, by the failure of the trial court to give an affirmative jury instruction that a subjective good faith belief that one is not violating the law can negate the statutory willfulness requirement of criminal tax offenses, as delineated by this Honorable Court's opinion in *Cheek v. United States*, __U.S.__ , 111 S.Ct. 604, 112 L.Ed.2d 617 (1991)

LIST OF PARTIES

The parties to this case in the Court of Appeals were as follows:

JOE W. REID

UNITED STATES OF AMERICA

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II. Whether, In a Criminal Tax Case, The Burden Of Persuasion Regarding The Defendant's State Of Mind Is Shifted To The Defendant, In Violation Of Due Process, By

The Failure Of The Trial Court To Give An Affirmative Jury Instruction That A Subjective Good Faith Belief That One Is Not Violating The Law Can Negate The Statutory Willfulness Requirement Of Criminal Tax Offenses, As Delineated By This Honorable Court's Opinion In *Cheek v. United States*, __U.S.__, 111 S.Ct. 604, 112 L.Ed.2D 617 (1991), Is An Important Question Of Federal Statutory And Constitutional Law Which Has Not Been, But Should Be, Addressed By This Honorable Court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported. The court's order is printed in Appendix A-I hereto. The judgement affirmed Petitioner's convictions of one count of tax evasion and one count of bribery in the United States District Court for the Northern District of Alabama.

JURISDICTION

The judgement of the United States Court of Appeals in the Eleventh Circuit was entered on March 24, 1992. A timely Petition for Rehearing was denied without opinion on July 6, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Petitioner was convicted of violating 18 U.S.C. § 666, Theft or Bribery Concerning Programs Receiving Federal Funds. The complete text of 18 U.S.C. § is set out in Appendix A-III.

In addition the legislative history of 18 U.S.C. § 666 found at S. Rep. No. 225, 98 Cong., 2d Sess. 369, Reprinted in 1984 U.S. Code Congressional and Administrative News 3182, 3511 is printed in Appendix A-IV.

Finally, 23 U.S.C. § 123 is also relevant to this particular question. That statute is presented in Appendix A-V.

II. With regards to Petitioner's conviction for income tax evasion, this case involves the Due Process clause of the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of

> War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Petitioner was convicted for violating 26 U.S.C. § 7201, which provides as follows:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the cost of prosecution.

STATEMENT OF THE CASE

I. PROCEEDINGS IN THE DISTRICT COURT:

On November 30, 1990, the Grand Jury for the Northern District of Alabama returned a Two Count Indictment against Petitioner, Joe W. Reid. Count One of the Indictment charged the Petitioner with attempting to evade federal income taxes due for income received in 1986 in violation of 26 U.S.C. § 7201. Count Two charged that the Petitioner, as a member of the Water Works Board of the City of Birmingham and its successor board, the Water Works and Sewer Board of the City of Birmingham, did corruptly accept $206,457.97 intending to be rewarded in connection with certain transactions of said Water Works Board in violation of Title 18 U.S.C. § 666(a)(1) (B). (R1-1)[1] The trial of said case commenced on February 4, 1991, before the Honorable James H. Hancock, United States District Judge for the Northern District of Alabama. On February 11, 1991, the jury returned its verdict finding the Petitioner guilty of both counts of the Indictment. Sentencing was held on March 11, 1991, at which time the Petitioner was sentenced as follows:

Count One: Twelve months in the custody of the Attorney General with the cost of prosecution taxed against the Petitioner;

Count Two: Five years in the custody of the Attorney General to run concurrently with the twelve-month sentence imposed under Count One and a fine of $35,000.00.

The Petitioner also was ordered to pay special assessments of $50.00 for each count of the indictment.

Notice of Appeal was timely filed on March 11, 1991, and Petitioner's Motion for Bail Pending Appeal was granted.

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[1] References to the trial court record are presented with reference to the volume and page number of the trial transcript.

II. Proceedings In The Eleventh Circuit Court of Appeals

On March 24, 1992, the United States Circuit Court of Appeals for the Eleventh Circuit issued a per curiam decision affirming the Petitioner's conviction. A Petition for Rehearing and Rehearing En Banc was timely filed on April 14, 1992. On July 6, 1992, said petition was denied, again without opinion. Petitioner's Motion for Stay of the Mandate was granted on August 7, 1992.

III. Facts Material to a Consideration of the Issues

At all times pertinent to the charges in this case, the Petitioner was a member of the Water Works Board for the City of Birmingham, Alabama. (the "Board") The Board is a corporation organized pursuant to § 11-50-230, et seq, Code Of Alabama. The Board does not administer any federal funds nor does the Board receive federal grants or assistance. The Board is, however, often reimbursed by the State of Alabama for labor and materials used by the Board to relocate water facilities that interfere with certain highway projects. A portion of the funds reimbursed to the Board by the State are received by the State from the Federal Highway Trust Fund.

Evidence elicited at Petitioner's trial set forth the manner and means by which the Board is reimbursed by the State with federal funds. At various times, the Board is required to relocate their water facilities due to highway construction or improvements. (R3-61) Prior to performing the work, the Board sends an estimate to the State of Alabama for the labor and materials that will be required for the relocation project. The estimate is then approved and authorized by the State. Following completion of the relocation work, the Board submits an invoice to the State for "reimbursement." (R3-65) The State disburses the invoice amount to the Board and then bills the Federal Highway Trust Fund for reimbursement of the expenditures paid to the Board. All of the payments to the Board for the relocation of the water facilities are paid as "reimbursements" in the "usual course of business" for labor and material (R3-61,65,68,69,75,84) and only to the extent authorized by 23 U.S.C. § 123.

During the year 1986, five highway projects of the State required the Board to relocate specific water facilities. For it's work on these projects, the Board was reimbursed a total of $73,938.46. (R3-74,84) Of this amount, approximately $65,000 was reimbursed

to the State with federal funds. (Govt. Ex. 74) The undisputed testimony indicates that pursuant to 23 U.S.C. § 123 each payment was reimbursement for "services rendered," including labor and materials. (R3-84) That is, the Board was only reimbursed for the actual cost attributable to each relocation project.

In 1985, the Petitioner and four others, including realtor Brooks Emory and attorney William Murray, formed an investment group (hereinafter referred to collectively as "Emory") for the purpose of purchasing property. (R3-87,90) The investors signed a Fiduciary Agreement naming Mr. Emory as Trustee to handle all financial matters, including accounting. (R3-29) The Trust was assembled in late spring of 1986, although the Fiduciary Agreement was not formally executed until August 20, 1986. (R3-29,31, Govt. Ex. 49) The Fiduciary Agreement listed three of the investors in their individual capacities, Mr. Murray's interest in the name of his corporation, "MYCA", and the Petitioner's interest in the name of "ALAGA, a Georgia entity." The Petitioner's daughter, Donna Johnson, signed on behalf of ALAGA. (Govt. Ex. 40, R4-66)

On April 7, 1986, U. S. Pipe Corp. committed to grant Emory an option to purchase 1220 acres of land. The price for the option was $150,000. (R2-78, Govt. Ex. 38) On April 28, 1986, the offer was extended to June 2, 1986. (R2-79, Govt. Ex. 39) Following this commitment, the investors began preparation for a proposed development. Mr. Murray and Mr. Emory also began discussions with the City of Birmingham with regard to the annexation of this property. In this regard, they met with David Vann, an attorney who handled the City's annexation legal matters. Mr. Vann was also Chairman of the Birmingham Water Works Board of which Petitioner was a member. (R2-31)

The initial meetings with Mr. Vann centered around annexation into Birmingham. In a meeting held on April 30, 1986, however, Mr. Emory and Mr. Murray learned for the first time that if the annexation was to take place, the Water Board also would have to control the water supply. (R2-33,57,59,171) At that meeting, Mr. Vann agreed that the Board would actually purchase from Emory the U. S. Pipe property for $6,555 per acre, payable as follows: $1,500,000 on or before May 15, 1986, and the balance of $5,491,000 on or before January 15, 1987. U. S. Pipe's offer to grant the option was pending at this time.

The Board met several times with regard to the proposed purchase of this property. Mr. Murray and Mr. Emory negotiated only with Mr. Vann and the Board Director; never with the full Board. (R2-73) After a series of negotiations, Emory, the Board and U. S. Pipe, each with the full knowledge of the others' participation, modified the original structure of the transactions and agreed to the following:

1. U. S. Pipe would increase the price for the option from $150,000 to $500,000.00 (Govt. Ex. 40);

2. The Board would purchase the option from Emory for $1,159,000.00, providing that:

   a) The Board would pay the required $500,000.00 to purchase the option through a check payable to Emory Realty and U. S. Pipe jointly, which Emory would then immediately endorse and tender to U. S. Pipe;

   b) Prior to the Board's "acceptance" of the assignment, Emory, at its cost, would remove all encroachments and encumbrances to said property and provide the Board with title insurance, a survey, and a general warranty deed;

   c) Emory would "assign" the option to the Board prior to May 30, 1986;

   d) The $500,000.00 would be credited against the purchase price of the land;

   e) Emory had the option of choosing the closing date which would be between December 15, 1986 and January 15, 1987;

   f) At closing, the Board would pay U. S. Pipe the balance of $5,356,000.00 for the purchase of the land and would pay Emory the "option purchase price" of $1,159,000.00;

g) The Board would petition Birmingham for annexation: and

h) Emory was given an option to re-purchase the property. (Govt. Ex. 55)

At trial, Mr. Emory testified that the investors wished to control the closing date so as to structure this investment in order to receive long term capital gains tax treatment. (R4-182) These transactions were done pursuant to the advice of Mr. Emory's independent, outside accountant; Mr. Murray (the attorney); and Mr. Murray's accountant.

The option to purchase the property (the Emory-U.S. Pipe Agreement), the purchase of the option (the Emory-Water Board Agreement), and the "assignment" of the option to the Board were executed simultaneously, as described above, on May 21, 1986 (Govt. Ex. 50,51) One week later, on May 28, 1986, David Vann, as Chairman of the Board, notified U. S. Pipe that the Board intended to "exercise" the option. (R3-21, Govt. Ex. 42)

Throughout the next six months, Emory performed those tasks required in the agreement with the Board. (R3-21, Govt. Ex. 42) The sale of the property and the sale of the option were closed simultaneously on December 15, 1986. The Board paid U. S. Pipe $5,376,286.17 for the property and paid Emory $1,163,143.52 for the option. (R3-17-26, Govt. Ex. 50,51)

Although the Petitioner, as a member of the Board, did not participate in the negotiations between Emory and the Board, the Government did elicit evidence that the Petitioner did not fully disclose to the other board members his involvement with the Emory group and that he lobbied other board members to relax restrictive covenants placed on the development of the property. It was this evidence, in sum, that supported the Government's theory that Petitioner had violated 18 U.S.C. § 666.

Following the closing, the investors received their respective proceeds from the sale of the option. The Petitioner's share was in the form of a check payable to "ALAGA" for $188,150.00. This check was deposited into an investment account in South Carolina that listed the Georgia address of Petitioner's son but the Petitioner's own social security number. (R3-143,146,149, Govt. Ex. 5)

All of the information concerning the transaction was turned over to Mr. Emory's independent, outside accountant, Mr. Law Lamar. (R3-198) Mr. Lamar prepared and filed with the IRS the Partnership Return of Income indicating that the partnership held "an option on land" from May 15 to December 15, 1986, and received income in the amount of $1,163,143.52. Because the option was held for more than six months, the individual Schedule K-1 Forms (A Partner's Share of Incomes, etc. for each investor) reported the income to each investor as a long term capital gain. The K-1 for "ALAGA" listed the Petitioner's social security number. (R3-200, Govt. Ex. 5)

Mr. Emory, the fiduciary responsible for the trust, told the partners that the money they received should be treated as a long term capital gain and both he and Mr. Murray treated their income as a long term capital gain. (R2-67, R4-183) There was no evidence presented to indicate that the partnership return or other investors' returns were ever challenged with regard to the tax treatment of this income.

Shortly before the deadline to file 1986 Income Tax Returns, the Petitioner orally advised a tax accountant that he had received a long term capital gain of $206,457. (R3-207) The Petitioner did not present the accountant with any documentation, but it was acknowledged that the oral information was consistent with the Form K-1 prepared by Mr. Lamar and given to Petitioner. (R3-215) From these figures, the Petitioner's tax liability was computed to be $28,755. The Petitioner timely forwarded this amount to the IRS, together with a Request for Extension to file his return. (R3-219, Govt. Ex. 1) A second extension was filed in August (R3-209, Govt. Ex. 2) but Petitioner did not timely file his return on October 15 as required. (R3-210,211)

At trial, Mr. Duncan McLean, an IRS auditor, testified that the Petitioner's 1986 tax return was ultimately filed in February 1990 and an additional $9,620.07 was paid on the income reported as a long term capital gain. This amount was due because of a calculation error made by Petitioner's accountant at the time that he filed for the first extension and paid the $28,000. (R3-206) This testimony was also presented by the defense through Mr. H. G. Owens, the accountant who prepared Petitioner's return. (R4-147, R5-24,25,28). As to the Petitioner's tax liability for 1986, Mr. McLean, without explanation as to why, treated the Petitioner's

income from the Emory Trust as a short term gain rather than a long term gain, thereby causing 100% rather than 40% of the gain to be taxed. (R4-141) He then calculated that the Petitioner had a 1986 tax liability of $55,791.93. (R4-142) It was acknowledged, however, that this determination was based solely on his opinion that the income from the Trust was a short term gain. (R4-151)

The Defense called as its witness Mr. John Holditch, a Birmingham real estate lawyer. Mr. Holditch had examined all pertinent documents regarding this transaction and, according to the Defense proffer, was prepared to give the following opinion with regard to the complete transactions and related documents: (R5-5-9,11-13)

1. That the May 21, 1986 agreement between Emory and the Water Works Board was a contract to purchase an option for $1,159,000.

2. That the Board would in effect loan Emory the $500,000 required to obtain the option from U. S. Pipe.

3. That in order to complete the assignment of the option, Emory was required to meet other conditions with regard to the U. S. Pipe property, namely, obtaining title insurance, a survey and legal fees, etc.

4. That had the Board not been satisfied with the performance of Emory, then the Board was under no obligation to complete the purchase of the option.

5. That Emory held the option from May 21, 1986 until the closing date of December 15, 1986 (approx. 7 months), at which time Emory received the agreed on consideration and the assignment of the option actually occurred.

The defense offered Mr. Holditch's testimony in rebuttal to Agent McLean's testimony to prove that Petitioner's income was, in fact, a long term capital gain and further, that Petitioner's treatment of this income as a long term capital gain was done in good faith.

The District Court found that the witness would be giving his legal opinion with regard to whether or not the documents created an option and for how long the option extended itself. The Court held

that it was the Court's function to give the legal effect of the documents and excluded Petitioner's expert testimony, even as it would pertain to good faith. (R5-8)

During jury instructions, the Court summarized the facts involving the Emory/U.S. Pipe Agreement and the Emory/Water Works Board Agreement, stating that:

> Under the written assignment received in evidence as Government's Exhibit 57 Emory Realty, on the same day, May 21, 1986, assigned to the Water Works Board the option Emory Realty had just acquired. Thus, as of May 21, 1986, Emory Realty has transferred to the Board the option which Emory Realty at that date acquired from U. S. Pipe. Emory Realty, Inc., after May 21, 1986, did not own the option acquired from U. S. Pipe on May 21, 1986. The Water Works Board owned the option after May 21, 1986.

(R5-129) (Emphasis added)

This charge had the legal of effect of stating as a matter of law that Emory did not hold the option for more than six months.

Finally, the Court charged the jury that the term "willfully," as used in criminal tax cases, "means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is to say with bad purpose to disobey or disregard the law." (R4-122) The Court further refused to give a jury instruction concerning Petitioner's good faith treatment of his income from the Emory trust. Petitioner's request for a good faith instruction was based on the undisputed evidence that Petitioner treated the Emory income in the same manner as the other Emory partners and consistent with the Partnership return and Petitioner's K-1 and the fact that Petitioner had timely paid over $28,000 in income taxes on said income. Petitioner's requested instruction read as follows:

> Reliance upon conduct of others in good faith, is not punishable under 26 U.S.C. § 7201. It is an absolute defense that the Petitioner conducted himself in good faith. In evaluating the Petitioner's good faith, you must consider whether the Petitioner relied upon his accountant and trust

partners for information, whether he even filed a tax return, whether he used his taxpayer I.D. number appropriately, whether he sent any money to the IRS in 1987.

(Court's Ex. No. 2, R5-71)

The jury convicted Petitioner on both counts of the indictment.

REASONS FOR GRANTING THE WRIT

I. WHETHER CONGRESS INTENDED TO EXTEND FEDERAL CRIMINAL JURISDICTION PURSUANT TO TITLE 18, UNITED STATES CODE, SECTION 666 TO LOCAL "ORGANIZATIONS," SUCH AS THE MUNICIPAL WATER WORKS BOARD OF THE CITY OF BIRMINGHAM, ALABAMA, WHERE THE ONLY FEDERAL MONIES RECEIVED BY SAID BOARD WERE REIMBURSEMENTS FOR LABOR AND MATERIAL ASSOCIATED WITH THE RELOCATION OF WATER FACILITIES DUE TO CERTAIN ROAD BUILDING PROJECTS, RATHER THAN "BENEFITS" AS THE TERM IS GENERALLY UNDERSTOOD, IS AN IMPORTANT QUESTION CONCERNING THE INTERPRETATION OF THE JURISDICTIONAL ELEMENT OF A CONGRESSIONAL STATUTE WHICH HAS NOT BEEN, BUT SHOULD BE ADDRESSED BY THIS HONORABLE COURT.

The Petitioner was convicted for violating Title 18 U.S.C. § 666 which prohibits the theft or bribery from an organization, government, or agency that "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666. [emphasis added]. The question presented by the Petitioner to this Honorable Court challenges the District Court's interpretation of the jurisdictional element of § 666. That is, the Petitioner challenges the finding that the Municipal Water Works Board of which he was a member, received "benefits" in excess of $10,000 and was therefore an "organization" within the meaning of 18 U.S.C. § 666. Petitioner's challenge is based on the undisputed facts that the only federal funds received by the Water Works Board were funds paid by and through the State of Alabama for labor and materials used by the Board to relocate water facilities in advance of a State highway project. While the State of Alabama may have received "benefits" in excess of $10,000, the Municipal Water Works Board did not. Any monies paid by the State of Alabama were purely commercial in nature,

having been paid in consideration for services rendered and/or in consideration of goods provided and are thus not benefits within the meaning of the statute.

Petitioner's request that this Honorable Court construe the jurisdictional element of 18 U.S.C. § 666, is apparently a case of first impression at the Federal appellate level. Although presented by Petitioner in his direct appeal, the Eleventh Circuit Court of Appeals elected to render a decision without opinion. Because this particular statute is relatively new, and the fact that it is obviously being used more frequently by Federal prosecutors, the question of Federal law raised by petitioner is therefore an extremely important one in that the Court's holding would literally expand or contract Federal criminal jurisdiction in regard to the common law offenses of theft and bribery. There is no doubt that a ruling by this Honorable Court on this particular issue will have a significant impact on future investigations and prosecutions under this statute.

It is the position of the Petitioner that the Water Works Board for the City of Birmingham did not receive the type of "benefits" or "Federal assistance" contemplated by Congress in enacting the above code section, and that therefore the District Court was without subject matter jurisdiction with regard to Count Two of his indictment. The term "benefits" is not defined in the statute and at trial, the District Court did not offer the jury an explanation as to what type of "benefits" must be received in order to fulfill the essential jurisdictional element of this offense. The District Court did, however, explain its interpretation of the statute in over-ruling Petitioner's Motion for Judgment of Acquittal. The District Court stated:

> Well, work and labor was done for the payment as opposed to welfare benefit payments or something of that nature. In other words, work and labor performed in effect being paid for by the Government, in my opinion, will satisfy the statute. It does not necessarily contemplate Government benefit programs like welfare or ... headstart. (R-114)

The Eleventh Circuit Court of Appeals apparently agreed with the District Court's broad interpretation.

The terms "benefits" and "assistance" are not defined in the statute. Accordingly, the Court must look to the legislative history of 18 U.S.C. § 666 to clarify these terms consistent with Congressional intent. See *Dixson v. United States*, 465 U.S. 482, 104 S.Ct. 1172, 79 L.Ed.2d 458 (1984). Petitioner submits that the reasoning of the District Court, as adopted by the Eleventh Circuit, is completely contrary to the Congressional intent behind the term "benefit" as gleaned from the following excerpt from the Legislative History:

> The term "Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or other form of Federal assistance" is to be construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery. However, the concept is not unlimited. The term "Federal program" means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal program or disbursement of funds will be covered. For example, if a Government agency lawfully purchases more than $10,000 from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier, a Federal crime. It is, however, the intent to reach theft and bribery in situations of the types involved in the *Del Toro*, *Hinton*, and *Mosley* cases cited herein.

S. Rep. No. 225, 98 Cong., 2d Sess. 369, Reprinted in 1984 U.S. Code Congressional and Administrative News 3182, 3511 [emphasis added.]

The following facts, which are undisputed, clearly demonstrate that the Birmingham Water Works Board is not the type of organization to which this statute was intended to apply:

1. The Board was in effect forced to relocate their water facilities in advance of highway projects. (R3-61)

2. The Board received no direct federal funds but was rather reimbursed by the State of Alabama Highway Department. (R3-65)

3. The State of Alabama paid the Board for material and labor in connection with the Board's relocation of its water facilities. (R3-84)

4. The services performed by the Board and paid for by the State Highway Department were strictly commercial and done in the normal course of business. (R-3-84)

5. The Board was considered to be just like any other "vendor" with regard to the services performed and payments received by the State Highway Department. (R3-84)

6. The State of Alabama paid for the Board's labor and material and then sought reimbursement from the Federal Highway Administration Trust Fund. (R-3-61)

As is the case with all federal monies, the Board was reimbursed pursuant to authorization granted in a particular federal statute: 23 U.S.C. § 123. That statute, however, specifically prevents a utility from profiting or in any way receiving a "benefit" due to the forced relocation of it's water facilities. The statute allows only for reimbursement of the "entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value if the new facility and any salvage value derived from the old facility." 23 U.S.C. § 123(c) (Emphasis added) The Board, therefore, receives no "benefits" or "assistance" whatsoever for it's efforts in relocating it's water facilities.

Petitioner respectfully submits that any federal monies paid through the State pursuant to the above process and authorization, lose their character as "benefits" once they are paid to a utility in a strictly commercial transaction. There was no allegation or even suggestion that there was anything illegal, improper, or fraudulent with respect to the invoice submitted by the Board or the payments made to the Board. In fact, as was clearly mandated by the authorization statute, 23 U.S.C. § 123, the Board only "broke even" on these transactions. Certainly this type of scenario, as exemplified

by the facts in this case, bear absolutely no similarity to the facts in the *Del Toro*, *Hinton*, and *Mosley* cases cited in this legislative history, the holdings of which dealt with the construction of the Federal Bribery Statute, 18 U.S.C. § 201, and prompted enactment of this statute.

In *United States v. Del Toro*, 513 F.2d 656 (2d Cir. 1975), *cert. den.* 423 U.S. 826 (1975), the defendant was an official of the city agency which administered the "Model Cities" Program funded through the United States Department of Housing and Urban Development. There, the United States paid 100% of the cost of the Model Cities' Program and 80% of its salaries. The defendant was convicted under Title 18 U.S.C. § 201, which prohibits the bribing of a federal public official, for accepting a bribe to lease certain office space. His conviction, however, was overturned by the Second Circuit which found that the defendant was merely a city employee rather than a federal employee. *Del Toro* at 663.

United States v. Mosley, 659 F.2d 812 (7th Cir. 1981) involved a defendant employed by the State of Illinois Bureau of Employment Security as a CETA Intake Eligibility Officer who was also convicted under 18 U.S.C. 201 for taking a bribe as a federal official. The Seventh Circuit found specifically that the defendant was a federal officer within the meaning of 18 U.S.C. 201 and affirmed the conviction.

In *United States v. Hinton*, 683 F.2d 195 (7th Cir. 1982) Aff. *Dixson v. United States*, 465 U.S. 482, 104 S.Ct. 1172, 79 L.Ed.2d 458 (1984), the defendants were officers of a community based non-profit corporation called United Neighbors, Inc. which had contracted with the City of Peoria to administer federal funds funded to the city under a community development block grant and federal metro reallocation grant from the United States Department of Housing and Urban Development. There, the community development grant was entirely sponsored with federal funds and paid the salaries and costs of United Neighbors, Inc. In affirming their convictions, this Honorable Court determined that the appropriate inquiry in determining if an individual falls within the category of "persons performing activities for or on behalf of the United States," was "whether the person occupies a position of trust with federal responsibilities." *Dixson*, 465 U.S. at 496.

The fact situation with regard to the case before this Honorable Court is clearly different from the types of "organizations" cited

above which had prompted Congressional action to amend § 666. As noted by the Honorable Mary Lou Robinson, United States District Judge for the Northern District of Texas, the programs that received "benefits" and "federal assistance" in *Del Toro*, *Hinton*, and *Mosley* all involved "a charitable distribution of funds; that is, the federal government distributing funds for the purpose of aiding the needy, and receiving no tangible material in return for its funds." *United States v. Stewart*, 727 F.Supp. 1068 (N.D. Tex 1989)

The nature of the relationship of the "organization" in *Stewart*, above, and the federal government is very similar to the facts in this case. In *Stewart*, the defendant was charged with stealing helicopter parts from Bell Helicopter. The government alleged that Bell Helicopter was an organization within the meaning of the statute in that Bell Helicopter was an organization that received benefits in excess of $10,000 pursuant to a federal program involving contracts for the manufacture and modification of helicopters for the United States. *Stewart* at 1070. Judge Robinson, however, correctly noted that the legislative history clearly did not intend to apply 18 U.S.C. § 666 to situations involving a quid pro quo or those transactions that were purely commercial in nature. *Stewart* at 1072. Likewise, monies paid in consideration for services or in consideration for goods provided, even if customized, are not benefits within the meaning of the statute. *Stewart* at 1072, citing *United States v. Webb*, 691 F.Supp. 1064 (N.D.Ill. 1988).

Webb, above, also involved a transaction similar to those found in this case. There, defendant was an employee of an accounting firm that had a contract to administer certain HUD grants. The District Court granted defendant's motion for judgment notwithstanding the verdict and judgment of acquittal with regard to his conviction for violation of 18 U.S.C. § 666. The Court specifically found that the accounting firm for which the defendant was employed was not an organization within the meaning of the statute in that the firm was merely paid consideration for administering certain HUD grants. *Webb* at 1167.

In other cases examining 18 U.S.C. § 666, the issues presented involved matters other than whether or not "benefits" or "federal assistance" was received by the organization. See e.g., *United States v. Cicco*, 938 F.2d 441 (3rd Cir. 1991) (statute did not apply to the defendant's alleged corrupt solicitation of political services and loyalty in exchange for municipal jobs); *United States v. Simas*, 937

F.2d 459 (9th Cir. 1991) (Government not required to trace federal funds); *United States v. Snyder*, 930 F.2d 1090 (5th Cir. 1990) (statute applies even if official's conduct does not directly affect the federal funds received by the agency); *United States v. Reynolds*, 919 F.2d 435 (7th Cir. 1990) (money which contractor obtained by submitting false claims in connection with HUD block grant program qualified as "money of the United States" within the meaning of the statute); *United States v. Little*, 889 F.2d 1367 (5th Cir. 1989) (statute applied even in absence that corruption costs would have to be replaced with federal funds); *United States v. Bordallo*, 857 F.2d 519 (9th Cir. 1988) (Guam not a "state" for purposes of 18 U.S.C. 666); *United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988) (government not required to trace federal revenue sharing funds); *United States v. Barquin*, 799 F.2d 619 (10th Cir. 1986) (Indian tribe not a "local government" within definition of 18 U.S.C. 666); and *United States v. Smith*, 659 F. Supp. 833 (S.D. Miss. 1987) (government not required to trace federal revenue sharing funds).

It should be emphasized that Petitioner does not contend that this is a "tracing" case similar to *Simas*, *Westmoreland*, and *Smith* cited above. The issue here presents this Honorable Court with essentially the following question: At what point do federal monies cease to be benefits within the meaning of 18 U.S.C. 666? If the Water Works Board, or any other contractor, fraudulently overbilled the State for its labor and material, then certainly the monies passing from the State to the vendor retain their character as benefits, but only to the extent of the fraudulent overpayment. Such was the case in *United States v. Reynolds*, 919 F.2d 435 (7th Cir. 1990). In that case, the Court affirmed the § 666 conviction of the Defendant for submitting false and fraudulent invoices for his work on redevelopment projects for the City of Milwaukee. Because Reynolds was paid on his false invoices from funds received by the City from Federal HUD grants, the Court found that jurisdiction was appropriate. *Id.* at 438.

It is respectfully submitted that Congress clearly did not intend to extend federal jurisdiction to alleged misuse of funds that occurred long after they were received from the federal sources in strictly commercial transactions. If the District Court's inter-pretation of benefits, as adopted without opinion by the Eleventh Circuit, is correct, jurisdiction would lie in the federal courts for the prosecution of an employee of any vendor doing more than $10,000.00 worth of business with the federal government, who

steals or embezzles over $5,000.00 from the vendor. For instance, federal jurisdiction would lie in the case of an employee theft from a vendor who sells over $10,000.00 worth of supplies to this Honorable Court.

Petitioner submits that the jurisdictional element of 18 U.S.C. § 666 is both vague and ambiguous and arguably susceptible to varying interpretations. Because of the vast sums of money distributed each year by the Federal Government, the incredible variety of the manner and means in which said funds are distributed, and the incredible number of vendors who do nothing more than "sell" $10,000.00 worth of supplies or services to the Federal Government, this issue is likely to present itself time and time again in the future. The District Court's interpretation of this statute as it applies to the Petitioner, and as adopted by the Eleventh Circuit, clearly constitutes a split from the decisions in *Stewart* and *Webb*. It is also a much more expansive interpretation than four members of this Honorable Court, including three current members, were willing to give to the Federal Bribery Statute in *Dixson*. *Dixson*, 465 U.S. at 464 (Justice O'Connor dissenting).

Given the obvious ambiguity and vagueness of this statute, varying interpretations and additional splits among the District Courts and Circuit Courts of Appeal are not only likely, but practically guaranteed. On the other hand, Petitioner has presented this Honorable Court with the opportunity to address an important question of federal law and Congressional intent regarding the expansion of federal jurisdiction, that will give prosecutors, District Judges, and Circuit Judges specific guidance with regard to future prosecutions.

Petitioner was snared in a net that was cast much broader than Congress intended. There was simply no misuse of any federal monies in this case. His conviction for violating 18 U.S.C. § 666 is, therefore, due to be reversed.

II WHETHER, IN A CRIMINAL TAX CASE, THE BURDEN OF PERSUASION REGARDING THE DEFENDANT'S STATE OF MIND IS SHIFTED TO THE DEFENDANT, IN VIOLATION OF DUE PROCESS, BY THE FAILURE OF THE TRIAL COURT TO GIVE AN AFFIRMATIVE JURY INSTRUCTION THAT A SUBJECTIVE GOOD FAITH BELIEF THAT ONE IS NOT VIOLATING THE LAW CAN NEGATE THE STATUTORY WILLFULNESS REQUIREMENT OF CRIMINAL TAX OFFENSES, AS DELINEATED BY THIS HONORABLE COURT'S OPINION IN *CHEEK V. UNITED STATES*, __U.S.__ , 111 S.CT. 604, 112 L.ED.2D 617 (1991), IS AN IMPORTANT QUESTION OF FEDERAL STATUTORY AND CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THIS HONORABLE COURT.

In *Cheek v. United States*, __ U.S. __, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), decided approximately one month prior to Petitioner's trial, this Honorable Court determined that a subjective "good faith misunderstanding of the law or a good faith belief that one is not violating the law" can negate the statutory willfulness requirement of criminal tax offenses. In so holding, this Honorable Court both expanded the interpretation of the statutory term "willfully" within the meaning of Federal tax laws to include an explanation of the Petitioner's good faith and broadened the scope of evidence deemed relevant to the issue of a criminal defendant's good faith. With regard to whether a jury instruction on good faith is necessary in a criminal tax case, the Court's holding in *Cheek* appears to implicitly overrule that portion of the Court's holding in *United States v. Pomponio*, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976) (per curiam) which held that an additional instruction on good faith was unnecessary. Further, with the Court now delineating a clear standard by which to judge a defendant's good faith within the meaning of criminal tax laws, the failure to give any instruction on good faith improperly shifts to the defendant the burden of proof with regard to his state of mind in violation of Due Process.

The opinion in *Cheek* carefully analyzed the historical evolution of the Court's interpretation of the statutory term "willfully" as used

in Federal criminal tax statutes, tracing its special treatment to the complexity of the tax law. Noting the general rule that ignorance of the law or mistake of law is no defense to a criminal prosecution, the *Cheek* opinion went on to state as follows:

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term willfully as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.

In *United States v. Murdock*, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), the Court recognized that:

> > Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. *Id.* at 396, 54 S.Ct., at 226.

The Court held that the defendant was entitled to an instruction with respect to whether he acted in good faith based on his actual belief. In *Murdock*, the Court interpreted the term "willfully" as used in the criminal tax statutes generally to mean "an act done with a bad purpose," *id.*, at 394, 54 S.Ct., at 225, or with "an evil motive." *Id.*, at 395, 54 S.Ct., at 225.

Subsequent decisions have refined this proposition. In *United States v. Bishop*, 412 U.S. 346, 93 S.Ct. 208, 36 L.Ed.2d 941 (1973), we described the term "willfully" as connoting "a voluntary, intentional violation of a known

> legal duty," *id.* at 360, 93 S.Ct., at 2017, and did so with specific reference to the "bad faith or evil intent" language employed in *Murdock*. Still later, *United States v. Pomponio*, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976) (*per curiam*), addressed a situation in which several defendants had been charged with willfully filing false tax returns. The jury was given an instruction on willfulness similar to the standard set forth in *Bishop*. In addition, it was instructed that "[g]ood motive alone is never a defense where the act done or omitted is a crime." *Id.*, at 11, 97 S.Ct., at 23. The defendants were convicted but the Court of Appeals reversed, concluding that the latter instruction was improper because the statute required a finding of bad purpose or evil motive. *Ibid.*
>
> We reversed the Court of Appeals, stating that "the Court of Appeals incorrectly assumed that the reference to an 'evil motive' in *United States v. Bishop*, *supra*, and prior cases," *ibid.*, "requires proof of any motive other than an intentional violation of a known legal duty." *Id.* at 12, 97 S.Ct. at 23. As "the other courts of appeals that have considered the question have recognized, willfulness in this context simply means a voluntary, intentional violation of a known legal duty." *Ibid.* We concluded that after instructing the jury on willfulness, "[a]n additional instruction on good faith was unnecessary." *Id.* at 13, 97 S.Ct., at 24. Taken together, *Bishop* and *Pomponio* conclusively establish that the standard for the statutory willfulness requirement is the "voluntary, intentional violation of a known legal duty."

Cheek, 111 S.Ct. at 609, 610 (emphasis added).

The trial court in *Cheek* had given the appropriate *Bishop /Pomponio* definition of willfulness as a "voluntary and intentional violation of a known legal duty." *Cheek*, 111 S.Ct. at 608 The trial court then went further and advised the jury that an "objectively reasonable" good faith misunderstanding of the law would negate willfulness but mere disagreement with the law would not, and that "an honest but unreasonable belief is not a defense and does not negate willfulness." *Cheek*, 111 S.Ct. at 608 This Honorable Court, however, rejected the requirement that a claim of good faith

belief must be "objectively reasonable" if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of a legal duty. The Court reasoned that holding the Defendant to an "objectively reasonable" standard had the effect of transforming the inquiry into defendant's good faith into a legal, rather than factual determination, thereby preventing its consideration by the jury. *Cheek*, 111 S.Ct. at 611. The Court held that it was error to instruct the jury to disregard evidence of Cheek's understanding that within the meaning of tax law, he was not a person required to file a return or pay income taxes and that wages are not taxable income, as incredible as such misunderstandings of and beliefs about the law might be. *Id.* The Court, therefore, transformed the analysis of the defendant's good faith from one of objective reasonableness to subjective reasonableness.

Petitioner respectfully submits that this Honorable Court's opinion in *Cheek* implicitly overrules that portion of the *Pomponio* decision that held that a good faith instruction was not necessary once the appropriate definition of willful was given to the jury. With regard to the evolution of the Court's interpretation of the statutory term willfulness, this would, of course, mean that the Court's opinion in *Cheek* has brought said interpretation full circle back to a portion of the Court's opinion in *Murdock* holding that a defendant was entitled to an instruction with respect to whether he acted in good faith based on his actual belief. The specific issue of whether a good faith instruction is now required, however, was not presented or addressed in *Cheek*. Moreover, by delineating a standard by which a defendant's good faith is to be judged, within the meaning of federal criminal tax laws, the failure to give an affirmative charge regarding good faith raises serious Due Process implications in that the burden of proving the defendant's state of mind has been shifted from the government to the defendant.

In the present case, Petitioner unsuccessfully sought to have the Court instruct the jury on Petitioner's good faith with regard to payment of his 1986 income taxes. Clearly there was evidence in the record to support such a request, including the following: that Mr. Emory, the fiduciary of the trust, had advised the partners that the fully disclosed income was a long term capital gain (R3-183); that the partnership returns prepared by Mr. Emory's independent, outside accountant and filed with the IRS indicated that the income was a long term capital gain (R3-200); that the Petitioner's Form

K-1 prepared by Mr. Emory's accountant indicated that the income was a long term capital gain (Govt. Ex. 5); and that the Petitioner fully disclosed this income to his accountant and the IRS by timely paying over $28,000 in tax on said income at the time that his first extension to file his return was filed with the IRS. (R3-219, Govt. Ex. 1) Without further instruction on Petitioner's "good faith," however, the jury was free to apply whatever standard to Petitioner's conduct that it deemed appropriate, including whether or not said conduct was "objectively reasonable." Petitioner respectfully submits, therefore, that failing to give an affirmative instruction on good faith in the context of criminal tax laws, is not only inconsistent with the Court's opinion in *Cheek*, but also renders an instruction on "willfulness" without reference to the Defendant's good faith unconstitutional in that it has the effect of shifting the burden to the Petitioner to prove that he acted in good faith and not willfully.

This Honorable Court has previously stricken as an unconstitutional violation of Due Process, jury instructions that had the effect of shifting the burden of proof on the critical question of a defendant's state of mind. See e.g., *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 9 L.Ed. 288 (1952). While these decisions dealt generally with jury instructions that included presumptions (i.e., "[t]he law presumes that a person intends the ordinary consequences of his voluntary act." *Sandstrom*, 442 U.S. at 516, 99 S.Ct. at 2455

The same analysis is appropriate in this case. Specifically, in that line of cases, one of the critical inquiries was whether the jury instruction left the jury with alternative standards when receiving the Defendant's conduct. For instance, in *Sandstrom*, the Court noted:

> First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon

> proof of the defendant's voluntary actions (and their "ordinary" consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence - thus effectively shifting the burden of persuasion on the element of intent.

Sandstrom, 442 U.S. at 517, 99 S.Ct. at 2456.

It is respectfully submitted that when a similar analysis is applied to jury instructions defining the term "willful" within the meaning of the criminal tax laws, a reference to defendant's good faith and an explanation of the standard by which to judge his good faith is constitutionally mandated. In the context of the tax laws, it is a simple matter for the prosecution to prove that Petitioner's conduct was both "voluntary" and "intentional" and that Petitioner had a "legal duty" to pay his taxes or report his income a certain way. By doing so, and without further instruction, the Petitioner is implicitly "presumed" to know of his legal duty. This is so because the jury is left without a standard by which to examine the possibility that the Petitioner did not know of his duty and/or that, even if he did so, his actions with respect to his taxes were reasonable and in good faith. The burden of proving the Petitioner's state of mind has, therefore, shifted from the Government to the Petitioner.

In this regard, it should be emphasized that in the case of Petitioner's conviction, the Court is not dealing with a "known legal duty" as simple as whether one is required to file an income tax return. Rather, the issue here is whether Petitioner knew that he had a legal duty to report and pay taxes on the income derived from the sale of the option contract as a short term capital gain rather than a long term capital gain. Such a determination, complicated by the series of transactions that took place with regard to said option, is beyond the expertise of most taxpayers.

The burden that shifted to Petitioner in this case was further compounded by two factors. First, in summarizing the evidence to the jury, the Court stated that once Emory had "assigned" the option it had acquired, Emory "did not own" the option. . . . the Water Works Board owned the option after May 21, 1986." (R5-129) The Court thus established the period that Emory held the option as being less than six months. With this instruction, the Court removed from

the jury's consideration the factual determination of the period that Emory held the option and thus established as a matter of law that the income received by the Petitioner was a short term capital gain. Petitioner's purported "duty" was therefore established as a matter of law.[2] Second, the Court prohibited the Petitioner from offering expert testimony regarding the "substance" of the transaction rather than its "form." This testimony was an essential part of Petitioner's defense that: 1) the income was derived from a long term capital gain, and 2) that it was certainly reasonable for Petitioner to assume that it was a long term capital gain on which he in good faith timely disclosed and paid his taxes with his request for an extension to file his return.[3]

The argument put forth by Petitioner is limited to jury instructions of the term "willful" within the context of the federal tax laws. This is so because of the unique aspects of federal taxation in

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[2] In the court below, Petitioner challenged the trial court's instruction regarding the holding period of the option as an improper finding of fact that should have been decided by the jury. Petitioner alleged that the court improperly singled out a single document rather than allowing the jury to consider the substance of the complete transactions in accordance with *Commissioner v. Court Holding Company*, 324 U.S. 331 (1945). In addition, Petitioner averred that the court's instruction was in error in that under Alabama law the date that an "assignment" of a contract actually occurs is a matter of fact, not law. *Baker v. Eufaula Concrete Company, Inc.*, 557 So.2d 1228 (Ala. 1990)

[3] Petitioner also challenged the District Court's refusal to allow the testimony of the defense expert as an abuse of discretion which denied Petitioner of evidence supporting this defense, citing *United States v. Opdahl*, 930 F.2d 1530 (11th Cir. 1991). Interestingly, the day after the Eleventh Circuit panel issued its opinion in Petitioner's case, a separate Eleventh Circuit panel issued the decision in *United States v. Lankford*, 955 F.2d 1545 (11th Cir. 1992), also a tax evasion case which is directly opposite to the holding in Petitioner's case. In *Lankford*, the Court held that the trial court abused its discretion in not allowing defendant's tax expert to testify concerning the reasonableness of defendant's conclusion that unreported income was a nontaxable gift rather than a political contribution, particularly as evidence was offered to rebut expert testimony offered by the government. *Id* at 1551, citing *Cheek*.

which "substance over form" controls. See *Commissioner v. Court Holding Company*, 324 U.S. 331 (1945). It's magnitude, however, is of considerable practical and constitutional proportions. Each year millions of taxpayers, accountants, attorneys, and tax preparers must interpret federal tax laws, both when filing and preparing returns and when considering tax planning. Literally thousands of those individuals will later be called on to justify their tax returns or the tax returns of their clients in either a civil or criminal proceeding. Within the context of our federal tax laws, the difference between the government's ability to impose only a civil sanction and their ability to deprive one's liberty through criminal prosecution is dependent on the state of mind of the taxpayer. This Court's clarification of the apparent inconsistency between the Court's opinions in *Cheek* and *Pomponio* regarding whether a defendant accused of criminal tax violations is entitled to an affirmative good faith charge, coupled with the constitutional ramifications of not giving such a charge, is an important issue of federal statutory and constitutional law and is essential so as to give guidance to both the Courts below and the taxpayers of the United States.

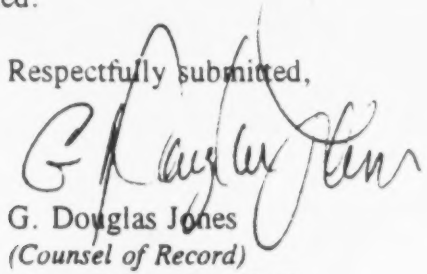
CONCLUSION

Petitioner's conviction under 18 U.S.C. § 666 was based on an expansive interpretation of the statute's federal jurisdictional requirements. The interpretation is inconsistent with the Congressional intent and purposes behind the enactment of said statute as was determined in the District Court opinions in Stewart and Webb. The Petitioner's conviction under this statute is, therefore, due to be reversed.

Likewise, the Petitioner's conviction for income tax evasion is due to be reversed. This Honorable Court's decision in Cheek requires that a trial court give an affirmative charge regarding a criminal tax defendant's good faith defense. Such a charge is mandated in order to prevent the burden of persuasion regarding the defendant's state of mind from unconstitutionally shifting to the defendant, as was done at Petitioner's trial.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on the 5th day of October, three copies of the above and foregoing have been served by United States mail, postage prepaid, and properly addressed to:

The Solicitor General
United States Department of Justice
Washington, DC 20530

Jack Selden, Esq.
United States Attorney
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G. Douglas Jones

APPENDIX

APPENDIX A-I

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-7260

Non-Argument Calendar

D.C. Docket No. CR()-H-257-S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOE W. REID,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Alabama

(March 24, 1992)

Before: EDMONDSON and COX, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

Date Filed: March 24, 1992

APPENDIX A-II

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-7260

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOE W. REID,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and COX, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James L. Edmondson
UNITED STATES CIRCUIT JUDGE

Date Filed: July 6, 1992

APPENDIX A-III

18 U.S.C. § 666

Theft Or Bribery Concerning Programs Receiving Federal Funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists -

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof -

(A) embezzles, steals, obtains by fraud or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that -

(i) is valued at $5,000 or more, and

(ii) is owned, by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstances referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section -

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State; and

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(4) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

APPENDIX A-IV

COMPREHENSIVE CRIME CONTROL ACT OF 1984

PART C - PROGRAM FRAUD AND BRIBERY

1. In general

This part of title XI is designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program. The proposal is derived from S. 1630, the Criminal Code Reform Act of 1981 approved by the Committee in the 97th Congress.[1]

2. Present Federal law

As indicated, this part of title XI covers both theft and bribery type offenses. With respect to theft, 18 U.S.C. 665 makes theft or embezzlement by an officer or employee of an agency receiving assistance under the Job Training Partnership Act a Federal offense. However, there is no statute of general applicability in this area, and thefts from other organizations or governments receiving Federal financial assistance can be prosecuted under the general theft of Federal property statute, 18 U.S.C. 641, only if it can be shown that the property stolen is property of the United States. In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds. Indeed, a recurring problem in this are (as well as in the

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[1] See, e.g., sections 1731 (Theft) and 1751 (Commercial Bribery) of S. 1630 and the discussion at pages 726 and 803 of S. Rept. No. 97-307 (97th Cong., 1st Sess.).

related area of bribery of the administrators of such funds) has been that State and local prosecutors are often unwilling to commit their limited resources to pursue such thefts, deeming the United States the principal party aggrieved.

With respect to bribery, 18 U.S.C. 201 generally punishes corrupt payments to Federal public officials, but there is some doubt as to whether or under what circumstances persons not employed by the Federal Government may be considered as a "public official" under the definition of 18 U.s.C. 201(a) as anyone "acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function." The courts of appeals have divided on the question whether a person employed by a private organization receiving Federal monies pursuant to a program is a "public official" for purposes of section 201. The issue is due to be decided soon by the Supreme Court,[2] at least in the context of the particular HUD program involved in that case.[3]

3. Provisions of the bill, as reported

Part C adds a new section 666 to title 18, United States Code. Subsection (a) makes it a Federal crime for an officer, employee or agent of an organization or of a State of local government agency that receives benefits in excess of $10,000 per calendar year pursuant to a Federal program to steal, embezzle, obtain by fraud, willfully misapply or otherwise knowingly convert without authority property valued at $5,000 or more. The

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[2] See *United States v. Hinton*, 683 F.2d 195 (7th Cir. 1982), cert. granted *sub nom*, *Dixon v. United States*, __U.S.__ (1982) (Nos. 82-5279 and 82-5331).

[3] Contrast *United States v. Loschiavo*, 531 F.2d 659 (2d Cir. 1976) and *United States v. Del Toro*, 513 F.2d 656 (2d Cir.) cert. denied 423 U.S. 826 (1975), reaching the opposite result as to the bribery of certain persons administering funds from another HUD program. See also *United States v. Mosley*, 659 F.2d 812 (7th Cir. 1981) (involving bribery by a State administrator of funds from the CETA program.)

offense is punishable by up to ten years in prison and a fine of up to $100,000 or twice the value of the property obtained in violation of this section, whichever is greater. The terms "agent", "organization", "government agency", and "local" are defined in subsection (d) and require no further explication. The Committee intends that the term "Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance" be construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery. However, the concept is not unlimited. The term "Federal program" means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier a Federal crime. It is, however, the intent to reach thefts and bribery in situations of the types involved in the *Del Toro*, *Hinton*, and *Mosley* cases cited herein.

APPENDIX A-V

23 U.S.C. § 123

Relocation of Utility Facilities

(a) When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on any Federal-aid system, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State. Such reimbursement shall be made only after evidence satisfactory to the Secretary shall have been presented to him substantiating the fact that the State has paid such cost from its own funds with respect to Federal-aid highway projects for which Federal funds are obligated subsequent to April 16, 1958, for work, including relocation of utility facilities.

(b) The term "utility", for the purposes of this section, shall include publicly, privately, and cooperatively owned utilities.

(c) The term "cost of relocation", for the purposes of this section, shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.

(2)

No. 92-595

FILED
DEC 9 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOE W. REID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the municipal board of which petitioner was a member received more than $10,000 in "benefits" under a federal program, thus rendering petitioner liable under 18 U.S.C. 666 for the corrupt acceptance of funds in connection with a transaction of the board.

2. Whether, in a prosecution for willfully attempting to evade tax in violation of 26 U.S.C. 7201, the trial court erred in refusing to give petitioner's requested good faith instruction, when the court fully and correctly instructed the jury on willfulness.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. AI-1) is unpublished, but the judgment is noted at 959 F.2d 972 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1992. Petitions for rehearing were denied on July 6, 1992. Pet. App. AII-1. The petition for a writ of certiorari was filed on October 5, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Northern

District of Alabama of willfully attempting to evade income tax, in violation of 26 U.S.C. 7201 (Count 1), and corruptly accepting a bribe as a member of a governmental organization receiving federal funds, in violation of 18 U.S.C. 666 (Count 2). Petitioner was sentenced to 12 months' imprisonment on Count 1 and to a concurrent term of five years' imprisonment on Count 2, and he was fined $35,000. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. AI-1.

1. Petitioner was a member of the Water Works Board of the City of Birmingham, Alabama (the Board). During 1985, petitioner formed a partnership with several local businessmen in order to purchase property from a company known as U.S. Pipe, Inc. On April 30, 1986, three of petitioner's partners met with David Vann, the Board's Chairman, and with the general manager of the Water Works. Without disclosing that petitioner was a member of the partnership, petitioner's partners stated that the partnership had an option to purchase the U.S. Pipe property and that they wanted to develop the land and negotiate land use restrictions with the Board. Vann responded that he preferred that the Board buy the property, attach restrictive covenants, and then give the partnership an option to buy portions of the land for development. Gov't C.A. Br. 4-5.

At a meeting on May 14, 1986, which petitioner did not attend, the Board considered whether to purchase the U.S. Pipe property. Because petitioner was absent, the Board sought assurance that he was not personally involved in the transaction. Vann then called petitioner to ask whether he had any financial interest in the U.S. Pipe property. Petitioner denied

having any such interest, and Vann reported that statement to the Board. The Board then voted to acquire the property. Gov't C.A. Br. 5-6. On December 12, 1986, three days prior to the closing date of the sale, the Board met to discuss the restrictive covenants for the property. At the meeting, petitioner argued for relaxed restrictions to encourage development. *Id.* at 7-8.

Subsequently, the Board acquired the property for a total of $5,876,935.68. For the sale of the option on the property, the Board also paid $1,163,143.52 to a company owned by one of petitioner's partners. In turn, that company issued checks to an entity known as Emory Trust, whose partners included an entity called ALAGA, which was controlled by petitioner. As a partner in Emory Trust, ALAGA received a check from the sale of the option in the amount of $188,150. The check was deposited into an investment company account in South Carolina in the name of ALAGA. The address for ALAGA reflected in the account records was the address of petitioner's son in Georgia. Gov't C.A. Br. 8.

After the land sale closed, petitioner continued to lobby the Board to relax the restrictive covenants. Petitioner never revealed that he was a partner in the group that arranged the property transaction. He disclosed his involvement only when confronted by Vann after the transaction came under investigation. Gov't C.A. Br. 8-9.

2. In 1990, petitioner was indicted for tax evasion and bribery. Gov't C.A. Br. 3. The theory of the tax evasion count was that petitioner willfully attempted to evade his income tax for 1986 by depositing his

share of the proceeds from the real estate transaction in an out-of-state account under the name ALAGA. *Id.* at 26-28. The theory of the bribery count was that petitioner had received a payment as a member of the Board "intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of" the Board, and that the Board received in 1986 "benefits in excess of $10,000 under a Federal program" involving a form of federal assistance (18 U.S.C. 666).[1] Gov't C.A. Br. 28. The jury convicted petitioner on both counts.

3. On appeal, petitioner argued that his conviction under 18 U.S.C. 666 could not stand because the Board was not an organization that had received in one year more than $10,000 in benefits under a federal program involving federal financial assistance. Petitioner also argued that the district court erred in refusing to give the jury petitioner's requested instruction with respect to his good faith defense to the tax evasion charges. The court of appeals affirmed in an unpublished order. Pet. App. AI-1.

ARGUMENT

1. Petitioner contends (Pet. 12-19) that he was not subject to prosecution under 18 U.S.C. 666, because the municipal body on which he served did not receive federal "benefits in excess of $10,000 under a Federal program" when the State used federal monies to

[1] The State of Alabama Highway Department made five payments to the Board during 1986 to reimburse it for certain expenditures in moving water lines. The payments included federal funds from the Federal Highway Trust Fund. The federal funds paid to the Board exceeded $10,000. Gov't C.A. Br. 9, 29-31.

reimburse the Board for expenditures the Board made. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of another court of appeals. As petitioner notes, the issue is one of "first impression" in the courts of appeals. Pet. 13. Accordingly, this Court's review is not warranted.

In relevant part, Section 666 makes it a crime for "an agent * * * of a State, local, or Indian tribal government, or any agency thereof[,] * * * corruptly [to] accept[] or agree[] to accept[] anything of value from any person, intending to be influenced or rewarded in connection with any * * * transaction * * * of such * * * government[] or agency involving any-thing of value of $5,000 or more." 18 U.S.C. 666(a)(1)(B). Section 666 is applicable, however, only if the

> government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. 666(b). Congress enacted Section 666 to "create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program." S. Rep. No. 225, 98th Cong., 1st Sess. 369 (1983).

Petitioner argues (Pet. 12-15) that he was not subject to prosecution under Section 666 because the funds received by the Board did not constitute "benefits" or "Federal assistance" within the meaning of 18 U.S.C. 666(b). He asserts (Pet. 12-13, 15, 18)

that even though the State paid the Board more than $10,000 in federal funds from the Federal Highway Trust Fund, see note 1, *supra*, those payments do not qualify as "benefits" because they were made in "strictly commercial transactions" and served only to reimburse the Board for the costs of material and labor involved in relocating water lines. The language, history, and purposes of Section 666 reveal that that contention is incorrect.

Section 666 applies to government entities that receive "benefits * * * under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). The natural reading of that provision is that it covers a state or local entity that is paid federal funds pursuant to a federal program designed to give financial support to specified activities. Contrary to petitioner's suggestion (Pet. 15), the statute does not require that the state or local entity profit from the receipt of the funds. The noun "benefit" is defined to mean, *inter alia*, "useful aid." *Webster's Third New International Dictionary* 204 (1986). That definition readily applies to federal assistance used to reimburse a local government entity for the costs of relocating water lines.[2]

[2] Section 666 has routinely been applied to corrupt officials who work for entities that receive federal program funds, and no court has suggested that the funds were not "benefits" absent a showing that the recipient earned profits. See, *e.g.*, *United States* v. *Westmoreland*, 841 F.2d 572 (5th Cir.) (county received revenue-sharing funds from the federal government), cert. denied, 488 U.S. 820 (1988); *United States* v. *Sadlier*, 649 F. Supp. 1560 (D. Mass. 1986) (hospital received medicare payments for patient service).

The history of Section 666 confirms that it applies to benefits paid under a federal program to reimburse a state or local entity for costs incurred. The Senate Report on the bill that became Section 666 stated that

> The Committee intends that the term "Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance" be construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.

S. Rep. No. 225, *supra*, at 370. While Congress did not intend the provision to have "unlimited" reach, the limitation that Congress described is that the provision should not be applied to all federal contractors or suppliers; there must be a statutory scheme that authorizes the disbursement of federal funds to achieve identified "policy objectives." *Ibid.* Here, the disbursements were not "strictly commercial" payments to a contractor or supplier. Pet. 15, 18. Rather, the federal funds at issue were authorized to be disbursed from the Federal Highway Trust Fund, established pursuant to 26 U.S.C. 9503, and the funds were allocated pursuant to 23 U.S.C. 121 and 123 to support local utility work.[3]

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[3] Section 123 provides that federal funds may be used to reimburse a State for costs incurred in the relocation of utility facilities necessitated by the construction of a project on any "Federal-aid system." The federal funds in this case were earmarked for and paid to the Board for the relocation of water lines. Gov't C.A. Br. 29.

Finally, the purpose of Section 666—to protect the integrity of funds expended through federal assistance programs—supports its application to payments made in a federal spending program that reimburses the recipient for costs incurred or services performed in accordance with the goals of the program. When a municipal body receives federal funds to compensate it for the provision of goods, services, or programs, it jeopardizes the integrity of the federal scheme and threatens to waste federal funds if the body's officials engage in corrupt activities in the transaction of official business.

In sum, because the court of appeals correctly rejected petitioner's argument that the Board did not receive federal "benefits," and no other court of appeals has addressed that issue, petitioner's claim does not merit further review.[4]

2. Petitioner contends (Pet. 20-27) that the district court's refusal to give his requested instruction on

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[4] Petitioner relies (Pet. 17) on *United States* v. *Stewart*, 727 F. Supp. 1068 (N.D. Tex. 1989), and *United States* v. *Webb*, 691 F. Supp. 1164 (N.D. Ill. 1988). Even if those decisions supported petitioner, a conflict between two district court decisions and the unpublished affirmance in this case would not warrant this Court's attention. In any event, those cases are distinguishable from this one. In *Stewart* the entity was a private contractor that was paid for providing equipment to the government. 727 F. Supp. at 1072. Here, the Board was a local government entity that received federal program monies to support local services. In *Webb*, the court held that the accounting firm for which the defendant worked was a conduit for distributing federal funds to others, not the ultimate recipient of them. 691 F. Supp. at 1169-1170. Here, the ultimate recipient was the Board.

good faith was inconsistent with *Cheek* v. *United States*, 111 S. Ct. 604 (1991). He also suggests (Pet. 24-26) that the absence of a good faith instruction shifted the burden of proof on the element of willfulness to him and therefore violated his due process rights. Those contentions are without merit.

At trial, the district court gave the following willfulness instructions on the tax evasion count (Instruction Tr. 121-122):

> The defendant can be found guilty of the events charged in Count One [charging tax evasion] only if all of the following facts or elements are proved beyond a reasonable doubt: First, the defendant owed substantial income tax in calendar year, [*sic*] in addition to that declared on his return and (2), that the defendant knowingly and willfully attempted to evade or defeat that tax. The proof need not show the precise amount of the additional tax due as alleged in the indictment but it must establish beyond a reasonable doubt that the defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.
>
> * * * * *
>
> The word "willfully" as that term is used in this case means that the act was committed voluntarily and purposely with the specific [intent] to do something the law forbids; that is to say, to act with bad purpose either to disobey or to disregard the law.

> The word "knowingly" means that the act was done voluntarily and intentionally and not because of accident or mistake.

The court refused to give petitioner's requested "good faith" instruction, which stated:

> Reliance upon conduct of others in good faith, is not punishable under 26 U.S.C. § 7201. It is an absolute defense that the Petitioner conducted himself in good faith. In evaluating the Petitioner's good faith, you must consider whether the Petitioner relied upon his accountant and trust partners for information, whether he even filed a tax return, whether he used his taxpayer I.D. number appropriately, whether he sent any money to the IRS in 1987.

Pet. 10-11, quoting Court's Exh. 2, 5 R. 71.

Petitioner's contention that the trial court erred in refusing to give a separate good faith instruction is foreclosed by *United States* v. *Pomponio*, 429 U.S. 10 (1976) (per curiam). In *Pomponio*, the court of appeals accepted the defendant's claim that, even though the trial court gave "full and complete" instructions on the requirement of a knowing evasion of taxes, "[s]ince a good faith belief would tend to negate the elements of willfulness and knowledge, [the defendants] were entitled to [such] an instruction." *United States* v. *Pomponio*, 528 F.2d 247, 249-250 (4th Cir. 1975). This Court reversed that holding. The Court held that when the trial judge has "adequately instructed the jury on willfulness" in a tax evasion case, "[a]n additional instruction on good faith [is] unnecessary." 429 U.S. at 13.

Here, as in *Pomponio*, the jury was properly instructed on willfulness. Willfulness under the criminal tax laws means the "voluntary, intentional violation of a known legal duty." *Cheek* v. *United States*, 111 S. Ct. at 610; *Pomponio*, 429 U.S. at 12; *United States* v. *Bishop*, 412 U.S. 346, 360 (1973). The trial court's explanation of willfulness in this case was in accord with that definition. The trial court instructed the jury that the term "willfully" means "that the act was committed voluntarily and purposely with the specific [intent] to do something the law forbids; that is to say, to act with bad purpose either to disobey or to disregard the law." That instruction was virtually identical to the instruction found to be adequate in *Pomponio*.[5] Under it, the jury cannot convict if it finds that the defendant believed in good faith that he was complying with the tax laws, because such a belief would negate the specific intent to do something forbidden by the law and with the bad purpose to disobey or disregard the law. Accordingly, as in *Pomponio*, the court was not required to give a separate instruction on good faith.

Petitioner contends (Pet. 20, 23) that *Cheek* v. *United States*, *supra*, implicitly overrules *Pomponio*'s holding that an additional instruction on good faith is not necessary. That claim is incorrect. In *Cheek*, this Court cited *Pomponio* with approval and specifically reaffirmed its holding that an additional

[5] In *Pomponio*, the jury was instructed that "[a] willful act" is "one done 'voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with [the] bad purpose either to disobey or to disregard the law.'" 429 U.S. at 11; see also *id.* at 11 n.2.

instruction on good faith is unnecessary when a jury is properly instructed on willfulness. *Cheek*, 111 S. Ct. at 610. The Court held only that in a tax evasion case, it is error to instruct the jury that "a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue." 111 S. Ct. at 611. That holding is fully compatible with the holding of *Pomponio* that the standard instructions on knowledge and willfulness are adequate to present the good-faith defense to the jury.

Petitioner also contends (Pet. 24-26) that the absence of a separate good faith instruction shifted to him the burden of proving that he acted in good faith and did not act willfully. There is nothing in the instructions that placed any burden on petitioner. Although petitioner asserts (Pet. 25-26) that once a legal duty is established in a tax prosecution, a defendant "is implicitly 'presumed' to know of his legal duty," the instructions did not authorize the jury to presume knowledge. Rather, they put the burden squarely on the government to show that petitioner willfully violated the tax laws. Accordingly, the instruction did not unconstitutionally relieve the government of its burden of proof.[6]

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[6] Petitioner's reliance on *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), is therefore misplaced. In *Sandstrom*, the trial court erroneously instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 513. The jury was not instructed to follow any such presumption here.

Although this Court's decision in *Pomponio* makes clear that a separate good faith instruction is not required, see *United States* v. *Solomon*, 825 F.2d 1292, 1297 (9th Cir. 1987), cert. denied, 484 U.S. 1046 (1988); *United States* v. *Kelley*, 864 F.2d 569, 573 (7th Cir.), cert. denied, 493 U.S. 811 (1989), some courts have held that a separate good faith instruction is required where there is an evidentiary basis for it. See *United States* v. *Mann*, 884 F.2d 532, 536-537 (10th Cir. 1989); *United States* v. *Harting*, 879 F.2d 765, 767-768 (10th Cir. 1989); *United States* v. *Duncan*, 850 F.2d 1104, 1117-1118 (6th Cir. 1988). We believe that those decisions are incorrect. Even under the rule requiring a separate good faith instruction, however, petitioner would not prevail because there was no evidentiary foundation for a separate instruction on good faith here, and because the instruction requested by petitioner was not an accurate statement of the law.

Petitioner's requested good faith instruction would have told the jury to consider whether petitioner relied in good faith upon the conduct of other persons in conducting his tax affairs. See p. 10, *supra*. There was no evidentiary foundation for the proposition that petitioner relied on other persons, however. Gov't C.A. Br. 22-25. Petitioner did not testify that he relied on other persons, and it does not follow from the fact that an accountant for another party gave tax advice to petitioner that petitioner in fact relied on that advice. *United States* v. *Masat*, 948 F.2d 923, 930 (5th Cir. 1991) ("contact" with professionals "does not necessarily indicate reliance on these professionals' advice"), cert. denied, 113 S. Ct. 108 (1992). Moreover, in discussing the element of reliance (Pet. 8),

petitioner does not assert that he relied on the advice of others in scheming to hide his partnership income from the U.S. Pipe transaction in a nominee out-of-state bank account. In short, in the absence of evidence of reliance, petitioner was not entitled to an instruction that would have invited the jury to speculate about reliance. *United States* v. *Schmidt*, 935 F.2d 1440, 1448-1449 (4th Cir. 1991); *United States* v. *Snyder*, 766 F.2d 167, 169 (4th Cir. 1985).

Nor did petitioner's proposed instruction accurately state the law. The proposed instruction stated that "[i]t is an absolute defense that the [p]etitioner conducted himself in good faith." See p. 10, *supra*. That is incorrect. It is not enough that petitioner "conducted himself in good faith" as a general matter; what was required was that petitioner had a good faith belief that he was in compliance with the tax statutes. *Cheek*, 111 S. Ct. at 610-611. Petitioner's instruction, therefore, would have been misleading to the jury.

Because a court is not required to give a theory-of-defense instruction that lacks support in the record or that is inaccurate, see *Mathews* v. *United States*, 485 U.S. 58, 63 (1988); *United States* v. *Jungles*, 903 F.2d 468, 478 (7th Cir. 1990), petitioner would not benefit even if the requirement of a separate good faith instruction were applied in this case. This Court's review of whether such an instruction would be required in another case is not warranted.[7]

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[7] It is also doubtful that the conflict on that issue merits this Court's review. This Court recently denied certiorari in a case presenting the question whether a separate good faith instruction is required in a false statements and mail fraud

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1992

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prosecution (18 U.S.C. 1001, 1341) in which the jury was correctly and completely instructed on willfulness. *United States* v. *Gross*, 961 F.2d 1097 (3d Cir.), cert. denied, 113 S. Ct. 439 (1992) (No. 92-205). In that case, while noting that the courts of appeals are in conflict on the separate-good-faith-instruction issue with respect to certain offenses, we opposed certiorari because the issue does not have sufficient importance in the administration of federal criminal trials to warrant this Court's review. U.S. Br. in Opp. 12. (We have provided a copy of our brief in opposition in *Gross* to petitioner.) The same conclusion applies to the parallel issue under the criminal tax statute that is presented in this case.